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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

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ROQUE A. MURACCIOLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

==========

# PETITION FOR WRIT OF CERTIORARI

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October 1996

48 pp

## QUESTION PRESENTED

Does the failure of a federal criminal indictment to allege an element of the offense sought to be charged render the ensuing conviction "subject to collateral attack" under 28 U.S.C. § 2255?

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## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Roque Muracciole and the United States).

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROQUE A. MURACCIOLE respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 15, 1996, affirming his convictions in the Southern District of Florida for technology export offenses.

## OPINIONS BELOW

The not-for-publication per curiam memorandum of the United States Court of Appeals for the Eleventh Circuit, filed on May 15, 1996 (Tjoflat, Ch.J., with Edmondson and Barkett, JJ.), is attached as Appendix A. There is no published opinion of the District Court. An unpublished Order of the district court, and the report and recommendation of the magistrate judge, are attached as Appendices B and C. The Eleventh Circuit's unpublished decision affirming petitioner's convictions on direct appeal is Appendix D, noted at 946 F.2d 903 (table), cert. denied, 503 U.S. 949 (1992).

## JURISDICTION

The Judgment and Memorandum of the United States Court of Appeals for the Eleventh Circuit were filed May 15, 1996. Appx. A. On July 18, 1996, the court of appeals denied the applicant's petition for rehearing. Appx. E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

**The Fifth Amendment to the United States Constitution** provides, in pertinent part, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...." The **Sixth Amendment** provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...."

**The Export Administration Act** ("EAA"), 50 U.S.C. Appx. § 2410, reads, in pertinent part:

> **(b) Willful violations**
>
> * * * *
>
> (3) Any person who possesses any goods or technology --:
>
> * * * *
>
> (B) knowing or having reason to believe that the goods or

technology would be so exported [i.e., "in violation of an export control imposed under section 5 or 6 of this Act" (codified at 50 U.S.C.Appx. §§ 2404 and 2405)],

shall, in the case of a violation of an export control imposed under section 5 [50 U.S.C.Appx. § 2404] ... be subject to the penalties set forth in paragraph (1) of this subsection ....

(4) Any person who takes any action with the intent to evade the provisions of this Act or any regulation ... issued under this Act shall be subject to the penalties set forth in subsection (a), except that in the case of an evasion of an export control imposed under section 5 or 6 of this Act ... such person shall be subject to the penalties set forth in paragraph (1) of this subsection ....

**Title 28 of the United States Code** provides, in part:

**§ 2255. Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the ...

court was without jurisdiction to impose such sentence, or that the sentence ... is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * *

**The Federal Rules of Criminal Procedure** provide, in pertinent part:

**Rule 7. The Indictment and the Information**

* * * *

**(c) Nature and Contents**

**(1) In General.** The indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ...

**Rule 12. Pleadings and Motions Before Trial; Defenses and Objections**

* * * *

**(b) Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. ... The following must be raised prior to trial:

* * * *

(2) Defenses and objections based on defects in the

indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); ....

* * * *

## STATEMENT OF THE CASE

This petition presents an important question concerning the cognizability of a constitutional issue under 28 U.S.C. § 2255.

### a. Procedural History

A federal grand jury in the Southern District of Florida returned a two-count superseding indictment against petitioner, Roque Muracciole. Count One charged that between September 5, 1989, and November 10, 1989, petitioner possessed an IBM computer "while knowing and having reason to believe that said computer would be exported from the United States without a validated export license and would be transshipped to Bulgaria," in violation of 50 U.S.C. Appx. § 2410(b)(3)(B). Count Two charged that at the same time and in connection with the same computer deal petitioner took "action with the intent to evade the licensing provisions of the Export Administration Act," by preparing a falsified

invoice, in violation of id. § 2410-(b)(4).[1]

No motion to dismiss either count of the indictment for failure to allege an offense was filed.

The case was tried before Judge Kehoe and a jury for three days, ending on February 1, 1990, with verdicts of guilty on both counts. On April 27, 1990, the court sentenced petitioner to serve 63 months' imprisonment on each count, followed by three years' supervised released, and to pay a special assessment of $100. Petitioner appealed to the Eleventh Circuit, challenging the sufficiency of the evidence to convict on either count. The convictions were affirmed on September 16, 1991, in a not-for-publication per curiam opinion. App. D, noted at 946 F.2d 903 (table), cert. denied, 503 U.S. 949 (1992).

Petitioner's § 2255 petition sought vacatur of his convictions and sentence, on the basis that each count of the two count indictment under which he was tried and convicted for violating the Export Administration Act, 50 U.S.C. Appx. § 2410, failed to charge an element of the offense. The panel held:

---

[1] By also citing id. § 2410(b)(1)(B), each count alleged that the charged violation was punishable under that section's enhanced penalty provisions.

> Where there is an offense defined by a federal statute of which the court has jurisdiction and there is an endeavor to charge such offense by the indictment ... and the court acquires jurisdiction over the person of the defendant, the sufficiency of the indictment ... is not subject to collateral attack by habeas corpus or motion under § 2255 ....

App. A2, quoting Rosecrans v. United States, 378 F.2d 561, 566 (5th Cir. 1967). The court did not mention or rely upon any other authority.[2]

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The jurisdiction of the court below rested upon 28 U.S.C. §§ 1291 and 2253, and was timely invoked by notice of appeal filed after entry of the order denying relief under 28 U.S.C. § 2255. Fed.R. App.P. 4(a); Fed.R.Gov. § 2255 Proc. 11. The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses, and 28 U.S.C. § 2255.

---

[2] The other case cited simply holds that prior Fifth Circuit precedent was adopted by the new Eleventh Circuit in 1981.

b. Statement of Facts

The per curiam opinion on direct appeal, App. D, summarizes the trial evidence in some detail. In short, a confidential informant offered to buy computer equipment from petitioner for export. Their dealings extended from mid-September 1989 through mid-November. Although petitioner initially told the informant that a validated export license would be required, he later acquiesced in the informant's refusal to proceed in that lawful manner. Petitioner suggested various ways to avoid detection of the illegal export by Customs. Eventually, the informant told petitioner that his ultimate customer was in Sofia, Bulgaria.

Petitioner later told the informant that he would not use his own company but rather a different freight forwarder, and that he would list the computer equipment on the invoice as "uninterruptible power supplies." In early November the informant gave petitioner a $61,000 down payment on the $658,040 price of the computer. On November 10, petitioner took the informant to inspect the computer, which was packed and ready for export. They then went to pick up blank invoice forms that petitioner had arranged to have printed with a false company name; he had signed for them with a false name. Petitioner filled out the invoice with the agreed false information. U.S. Customs agents arrested him later that day.

## REASON FOR GRANTING THE WRIT

**The decision below conflicts with the historical recognition by this Court that the failure of a federal indictment to alleged the elements of an offense is a fundamental defect which may be noticed and corrected by collateral attack.**

The claim advanced in petitioner's motion under 28 U.S.C. § 2255 is cognizable on collateral attack, because the alleged defect -- omission of an element -- is "jurisdictional" in the sense discussed in older habeas cases, or "fundamental" in contemporary terms.

As stated by this Court in Hamling v. United States, 418 U.S. 87, 117 (1974), an indictment is not sufficient unless it "first, contains the elements of the offense charged ...." Accord, United States v. Bailey, 444 U.S. 394, 414 (1980). This rule implements two separate constitutional guarantees, the Fifth Amendment's right not to be held for trial except upon the indictment of a grand jury, and the Sixth Amendment's requirement that the defendant know "the nature and cause of the accusation." The issue presented by petitioner's petition was therefore cognizable in a proceeding under 28 U.S.C. § 2255 to vacate the conviction and sentence.

This Court's precedent establishes a distinction between two lines of cases:

Where the alleged deficiency in an indictment goes only to whether the facts set forth constitute the offense, the defect will permit a pretrial motion to dismiss, but the issue is not cognizable for the first time on habeas. When the challenge focuses on the indictment's averment of the elements, however, the claim must be heard "at any time," Fed.R. Crim.P. 12(b)(2), including on collateral attack. This is the distinction made in the early cases first stating and applying the rule of cognizability vel non of this kind of issue in federal habeas corpus.

Thus, in Haas v. Henkel, 216 U.S. 462, 476-81 (1910), reviewing an exercise of habeas jurisdiction, the Court discussed at length whether an indictment fundamentally charged the offense of conspiracy to defraud the United States.[3] At the same time, the Court declined to discuss "minor objections which go to the form of the indictments rather than to the substance." Id. at 481. See also Hyde v. Shine, 199 U.S. 62, 78-83 (1905)

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[3] The Court had earlier held that where a right of direct appeal exists, pretrial habeas will not lie to challenge the sufficiency of the indictment. Riggins v. United States, 199 U.S. 547 (1905); accord, Henry v. Henkel, 235 U.S. 219 (1914).

(similar); Ex parte Yarbrough, 110 U.S. 651 (1884) (giving full consideration, on habeas, to question whether indictment charged an offense).

In Dimmick v. Tompkins, 194 U.S. 540, 551-52 (1904), on the other hand, the Court held that a claim that the alleged acts do not constitute the offense charged is not cognizable on habeas. Accord, Ex parte Parks, 3 Otto (93 U.S.) 18 (1876) (whether facts alleged are sufficient to make out offense fully charged, held not cognizable); see also Goto v. Lane, 265 U.S. 393, 402 (1924) (indictment's use of "or" rather than "and" could not be challenged on post-conviction collateral attack by defendant who stipulated at trial that indictment should be taken as alleging "and," and point had been defaulted on appeal). See generally Bowen v. Johnston, 306 U.S. 19 (1939) (lack of territorial jurisdiction cognizable on habeas).

As the Court held in Hagner v. United States, a statute directing the courts to disregard defects in indictments which are merely matters of form does not:

> dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorized the court to disregard merely loose or inartificial [sic] forms of

averment. Upon a proceedings after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.

285 U.S. 427, 433 (1932). Neither count of the indictment on which petitioner was convicted correctly charges all the elements of the offense involved in that count.

Petitioner was charged in each of the two counts with violating a separate provision of the Export Administration Act, 50 U.S.C. Appx. § 2410. In Count One, the grand jury charged petitioner with:

> knowingly possess[ing] a good, commodity and technology, that is one International Business Machines (IBM) AS-400 Series B60 computer system valued at approximately [$658,000], which computer was subject to the licensing requirements of the Department of Commerce under the Export Administration Regulations, while knowing and having reason to believe that said computer would be exported from the United States without a validated export license and would be transshipped to Bulgaria as the country of ultimate destination, in viola-

> tion of [50 U.S.C. Appx. §§] 2410(b)(3)(B) and (b)(1)(B); and [15 C.F.R. §§] 787.1(a)(1)(ii)(C) and (a)(1)(ii)(A), 787.2 ....

As the government conceded below, "willfulness" is an element of the Count One offense, even though the word does not appear in the statutory language. CA11 Gov't Br. 13. In this kind of case, only the intentional violation of a known legal duty serves to turn otherwise innocent (albeit knowing and deliberate) possession into a legitimately punishable act. See Ratzlaf v. United States, 510 U.S. 135 (1994).[4] See also Staples v. United States, 511 U.S. --, 128 L.Ed.2d 608, 624 (May 23, 1994). Count One of this indictment fails that test.

Count One does not allege, in words or substance, that petitioner knew of the EAA regulations applicable to the AS-400 computer and intended by his acts to violate or disregard those rules. Nor are any words of similar import to "willfulness" to be found in Count One.

---

[4] As the Chief Justice recently wrote for the Court in United States v. X-Citement Video, Inc., 513 U.S. --, 130 L.E.2d 372, 381 (1994), that "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize[s] otherwise innocent conduct."

Thus, even applying the "liberal" standard that governs here, Count One of petitioner's indictment fails to allege the scienter element of the offense.

Count Two was charged under a subsection of the EAA, 50 U.S.C. Appx. §§ 2410(b)(4), different than that involved in Count One. Count Two alleged that between about September 5 and about November 10, 1989, petitioner:

> did knowingly take action with the intent to evade the licensing provisions of the Export Administration Act, that is, prepare an invoice for the sale of an IBM AS-400 Series B60 Computer System containing false information, namely that the items being sold were "Uninterruptible Power Supplies" and related items ..., when in truth and in fact, as defendant MURACCIOLE then and there well knew, the item being sold was an IBM AS-400 Series B60 Computer System, with the intent that said information would be provided to the freight forwarder responsible for the export of said computer, in violation of [50 U.S.C. Appx. §§] 2410(b)(4)

and (b)(1)(B); and [15 C.F.R.[5] §§] 787.1(a)(1)(ii)(D) and (a)(1)(ii)(A), 787.2 ....

This count, like Count One, evidently refers to § 2410(b)(1)(B) as a device for alerting the accused that the enhanced penalty of (b)(1) was being sought.

Subsection (b)(4) of the EAA distinguishes between two degrees of the offense by separating out for harsher punishment (see § 2410(b)(1)) those instances constituting a "case of an evasion of an export control imposed under section 5 ...."[6] See Statutes Involved ante. Subsection (b)(4) of the EAA does not call for the enhanced penalty to be applied where the defendant's actions are accompanied only by a mere, unconsummated "intent to evade," as alleged in Count Two in this case. Petitioner's challenge § 2255 to Count Two focused on the grand jury's failure to allege that this was such a case. Thus, Count Two also fails to allege an element of the offense, just as does Count One.

---

[5] The reference in this count to the Code of Federal Regulations actually says "Title 50," where title 15 was intended.

[6] Because this case involved an alleged attempt to export a certain kind of sophisticated computer to Bulgaria, it came with section 5 of the Act. 50 U.S.C.Appx. § 2404.

Under Fed.R.Crim.P. 12(b)(2), the failure of an indictment "to charge an offense ... shall be noticed by the court at any time during the pendency of the proceedings." The requirement articulated in Hamling, supra, that the indictment allege facts constituting the offense is imposed by Federal Criminal Rule 7(c), and is of constitutional dimension only when the indictment is so bare of facts that the defendant does not have real notice of what accusation he or she must meet. But the requirement that the indictment contain all the elements is of constitutional dimension; it follows from the commands of the Fifth Amendment grand jury clause and the Sixth Amendment's accusation clause.

The constitutional rule that each count of an indictment must allege all the elements of the offense is fundamental and jurisdictional, and is therefore cognizable in a proceeding under 28 U.S.C. § 2255. See United States v. Timmreck, 441 U.S. 780, 784-85 (1979) (taking for granted that constitutional claims are cognizable and discussing when a conviction may be subject to collateral § 2255 attack for violation of a Rule); Davis v. United States, 417 U.S. 333 (1974) (rejecting government's argument that only constitutional claims are cognizable and explaining when statutory claims may be heard under § 2255).

The deficiencies in the drafting of the indictment in this case were not

merely technical, but rather were both fundamental and prejudicial. See Hagner v. United States, 285 U.S. 427, 433 (1932). Where "willfulness" is an element of an offense, the court must dismiss any indictment which omits that allegation. The requirement of alleging every element extends equally to elements not found in the language of the statute, but which have been read into it as a matter of construction. Petitioner's petition under § 2255 thus alleged a jurisdictional defect cognizable on collateral attack.

Certiorari should be granted to correct the misapprehension of law on which the lower court's decision is based.

## CONCLUSION

For the foregoing reasons, petitioner ROQUE MURACCIOLE respectfully prays that this Court grant his petition for a writ of certiorari, reverse the judgment below, and direct that his conviction be vacated.

Respectfully submitted,
LAW OFFICES OF
ALAN ELLIS, P.C.

By: PETER GOLDBERGER
Attorneys for Petitioner

October 15, 1996.

**APPENDIX A**

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAY 15 1996

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 95-4001
Non-Argument Calendar

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D.C. Docket Nos. 89-809-CR-JWK,
92-2011-CIV-JWK

ROQUE MURACCIOLE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from
the United States District Court
for the Southern District of Florida

---

(May 15, 1996)

BEFORE: TJOFLAT, Chief Judge, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

In these proceedings under 28 U.S.C. § 2255, appellant seeks the vacation of his convictions on two counts of violating 50 U.S.C. App. § 2410(b) on the ground that neither count of the indictment alleged an element of the offense charged. Appellant did not raise this claim on direct appeal; at that time, we affirmed his convictions. Muracciole v. United States, 946 F.2d 903 (11th Cir. 1991)(per curiam, unpublished).

> Where there is an offense defined by a federal statute of which the court has jurisdiction and there is an endeavor to charge such offense by the indictment ... and the court acquires jurisdiction over the person of the defendant, the sufficiency of the indictment ... is not subject to collateral attack by habeas corpus or motion under § 2255 ....

Rosecrans v. United States, 378 F.2d 561, 566 (5th Cir. 1967), Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

In the instant case, the indictment plainly endeavored to charge offenses defined by federal statute; moreover, there can be no doubt that the indictment gave appellant adequate note of the criminal conduct for which he was being brought to the bar.

The district court's denial of section 2255 relief is, accordingly, AFFIRMED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-2011-CIV-KEHOE
89-809-CR-KEHOE

| FILED by s/JNH |
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| CARLOS JUENKE |
| CLERK, U.S. DIST. CT. |
| S.D. OF FLA. - MIAMI |

ROQUE A. MURACCIOLE,
Movant,

vs.
UNITED STATES OF AMERICA,

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

Respondent.
_____/

THIS MATTER arises before the Court upon the Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. U 2255 (Docket Entry No. 47). On February 4, 1993, the Magistrate Judge issued a Report and Recommendation on the motion. Pursuant to the Report and Recommendation, and in light of the Court's independent review of the record and applicable law, the Court entered an Order denying the motion on March 1, 1993. On March 19, 1993, the Movant submitted objections to the Magistrate's

Report and Recommendation, and on March 26, 1993, he filed a motion seeking to vacate this Court's Order denying the motion to vacate, set aside or correct his sentence because of extenuating circumstances.

This Court has, by separate order, granted the Movant's motion to vacate the Order denying Movant's motion to vacate, set aside or correct his sentence and to obtain reconsideration of the latter motion. On reconsideration of the Movant's motion to vacate, set aside or correct his sentence in light of his objections to the Magistrate Judge's Report and Recommendation, the Court concludes, based on its independent review, that the motion should not be granted. Accordingly, it is hereby

ORDERED and ADJUDGED that the Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED.

DONE and ORDERED in Chambers at Miami, Florida this 1st day of November, 1994.

s/James W. Kehoe
JAMES W. KEHOE
SENIOR U.S. DISTRICT JUDGE

copies furnished to:
Counsel of Record

**APPENDIX C**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-2011-Civ-KEHOE (SNOW)
89-809-Cr-KEHOE

ROQUE MURACCIOLE, :
Movant, :
vs. :
UNITED STATES OF AMERICA, :
Respondent. :
:

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. §2255 and was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

I. PROCEDURAL HISTORY

On December 12, 1989, the movant was charged in a two-count, superseding indictment with: (1) possession of an International Business Machine (IBM) AS-400 Series B60 computer system while knowing or having reason to believe that the system would be exported to Bulgaria without the required validated export license as required, in violation of 50 U.S.C. App. §2410(b)(3)(B) and (b)(1)(B); 15 C.F.R. §787.1(a); and (2) knowingly taking action with intent to evade the licensing provisions of the Export Administration Act (the "Act"), by

preparing a false invoice for the export of the computer system, in violation of 50 U.S.C. §§2410(b)(4) and (b)(1)(B); 15 C.F.R. §§787.1(a) and 787.2. The case proceeded to trial, and the jury found the movant guilty as charged. On April 27, 1990, this Court sentenced the movant to 63 months imprisonment, a three-year term of supervised release and a $100 special assessment.

The movant appealed his conviction, requesting to proceed pro se owing to the "complexities of the case." (See letter from Government's Response, Exhibit A). The Eleventh Circuit Court of Appeals granted movant's counsel permission to withdraw. After full briefing, the appellate court issued a per curiam decision on September 16, 1991, affirming the movant's conviction. (Response, Exhibit B).

On November 26, 1991, the movant's request for rehearing was denied. The movant then filed a 49-page petition for a writ of certiorari to the United States Supreme Court, which was denied.

On his direct appeal, the movant claimed that the evidence was insufficient to establish his possession of the computer system (Count I) and his intent to evade the licensing provisions of the Act (Count II). The movant did not argue that the evidence failed to establish that he acted willfully or that violations of the Act had occurred.

The instant motion for §2255 relief then was filed. The movant raises two claims: (1) the court lacked jurisdiction over the instant case because the indictment failed to allege the essential elements of willfulness and a violation of the Act or a regulation issued thereunder, and (2) ineffective assistance of counsel in connection with pretrial preparation, opening and closing statements, motions for judgment of acquittal, and requests and objections to jury instructions.

II. RECOMMENDATIONS OF LAW

A. Sufficiency of the Indictment and Subject Matter Jurisdiction

The superseding indictment is included as Appendix E to the instant motion. In paragraph 3, the indictment describes the export licensing requirements of the Act that were applicable to the IBM Computer System involved in the instant case, and recited prior to exporting that computer to certain countries, including Bulgaria. Count I charged the movant with knowing possession of the computer system with knowledge or reason to believe that it would be exported without a validated license as required, and Count II alleged that the movant acted knowingly with the intent to evade the licensing provisions of the Act, specifically the falsification of an invoice with the intent to provide the false information to the

freight forwarder responsible for the export.

The movant first contends that the indictment is deficient because it fails to allege that he acted willfully. Although the indictment odes not contain the word "willfully," it specifically alleged that the movant acted with specific intent to violate the law and with the specific knowledge that the law was being violated. The indictment tracks the language of 50 U.S.C. App. §§2410(b)(3)(B), (b)(4), which provide:

> (3) Any person who possesses any goods or technology -
>
> (A) with the intent to export such goods or technology in violation of an export control ... or
>
> (B) knowing or having reason to believe that the goods or technology would be so exported,
>
> shall ... in the case of a violation of an export control ... be subject to the [criminal] penalties set forth in [50 App. §2410] subsection (a).
>
> (4) Any person who takes any action with the intent to evade ... an export control ... shall be subject to the penalties set forth in paragraph (1) of this subsection.

An indictment is sufficient if it "'tracks the wording of the statute, as long as the language sets forth the essential elements of the crime.'" United States v. Critzer, 951 F.2d 306, 308 (11th Cir. 1992)(quoting United States v. Yonn, 702 F.2d 1341, 1348 (11th Cir.), cert. denied, 464 U.S. 917 (1983)).

As the Government stated in its brief on appeal, in order to prove the violation alleged in Count I of the indictment, it was required to show: (1) that the movant knowingly possessed the computer as charged; (2) that he possessed the computer knowing or having reason to believe that it would be exported without a valid license; (3) that he knew that the intended destination was Bulgaria; and (4) that he knew it was against the law to export the computer to Bulgaria without a validated export license and willfully violated the law. In order to prove a violation of Count II of the indictment, the required showing was that (1) the movant took action with the intent to evade the licensing provisions of the Act; (2) the movant did so knowingly; and (3) he knew it was against the law to export the computer to Bulgaria without a validated export license. (Government's Response, Exhibit C, pp. 14, 17). The Court instructed the jury on

each of these elements (Transcript of trial, pp. 426-428), and the Eleventh Circuit found that the evidence supported the movant's conviction. (Response, Exhibit C).

Clearly, the indictment contained sufficient allegations of scienter to confer criminal subject matter jurisdiction on this Court. Moreover, the Eleventh Circuit specifically held that "the evidence clearly establishes that Muracciole falsified the sales invoice for the computer with the specific intent of evading the export license requirements of the Act." (Response, Exhibit C, p. 8).

The movant also contends that the indictment is deficient because it fails to allege that any specific provision of the Export Control Act was violated. As noted earlier, the indictment describes the licensing provisions applicable to the IBM computer system, and alleges that the movant possessed the computer system knowing that no export license would be obtained prior to export of the system to Bulgaria, and that he prepared a false invoice (misdescribing the computer system) with the intent to avoid the required export license. Thus, the indictment sufficiently alleges violations of 50 App. [sic] §§2410(b)(3)(B) and (b)(4).

These provisions do <u>not</u> require, as the movant contends, that the

violation of the Act (here, the export of the computer system to Bulgaria without obtaining an export license) actually take place. The provisions do specify that the same penalties (as set forth in 50 App. [sic] §§2410(a) and (b)(1)) apply to a person who acts with knowledge that the Act will be evaded or with intent to evade the Act, as to a person who commits the actual violation. Any other construction of 50 App. [sic] §§2410(b)(3)(B) and (b)(4) would render those provisions meaningless.

Therefore, the indictment sufficiently alleges criminal violations as set forth in 50 App. [sic] §2410, and the movant's claim that this Court lacked subject matter jurisdiction is without merit.

B. Ineffective Assistance of Counsel

The movant also claims that his trial counsel was ineffective because he failed to conduct meaningful pretrial litigation and his performance was inadequate during the trial.

The standards which must be applied in determining what constitutes ineffective assistance of counsel are set forth in Strickland v. Washington, 466 U.S. 668 (1984). There the court held that "the proper standard of attorney performance is that of reasonably effective assistance," and that the burden is on the

defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id., at 687-688. In determining whether the defendant has met this burden,

> ... a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the fact of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The court in Strickland noted that counsel in any criminal case has certain basic duties: a duty of loyalty, to avoid conflicts of interest; a duty to advocate the defendant's cause, to consult with the defendant on important decisions and keep him informed of important developments in the case; and a duty to apply "such skill and knowledge as

will render the trial a reliable adversarial testing process." Id. at 688. In determining whether counsel in a particular case adequately performed these duties, the reviewing court must make every effort to "eliminate the distorting effects of hindsight ... and to evaluate the conflict from counsel's perspective at the time," and the court should apply "a heavy measure of deference to counsel's judgments." Id. at 689, 691.

The "burden of proof for showing ineffective assistance of counsel is, and remains, on petitioner throughout a habeas corpus proceeding." Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also, Jones v. Kemp, 678 F.2d 929, 932 (11th Cir. 1982). The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, at 694.

An accused's counsel must be able to present "an intelligent and knowledgeable defense," Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970), but he is not obliged to pursue avenues clearly of no evidentiary value, or avenues he is instructed by his client to pursue. See, Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980); United States v. Johnson, 615 F.2d 1125 (5th

Cir. 1980); Mays v. Estelle, 610 F.2d 296 (5th Cir. 1980).

Trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id., at 688-690. An evidentiary hearing is not required where the movant's allegations do not demonstrate prejudice resulting from the alleged errors of counsel. Harich v. Dugger, 844 F.2d 1464, 1471 n. 7 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989).

With regard to his claim regarding counsel's failure to conduct meaningful pretrial litigation, the movant cites counsel's failure to move to dismiss the indictment on the grounds that it failed to allege that the movant acted willfully, and failed to allege that an actual violation of the Export Control Act occurred. As discussed earlier, these arguments are without merit, and the movant suffered no prejudice resulting from his lawyer's failure to advance them in a motion to dismiss.

The movant also contends that his lawyer's trial performance was deficient because he failed to make an opening statement, failed to supply any caselaw when making his motion for judgment of acquittal, and failed to

object to the court's jury instructions on the elements of the offenses charged in the indictment.

The decision whether to make an opening statement is a matter of defense strategy, which cannot be a basis for a finding of ineffective assistance of counsel. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1992).

The failure of counsel to cite any caselaw in support of his motion for judgment of acquittal resulted in no prejudice to the movant. First, this Court is familiar with the legal standard to be applied in determining whether a case may be submitted to the jury. Second, the movant cited the pertinent caselaw to the Court of Appeals when arguing the insufficiency of the evidence presented at trial. Based on the applicable cases cited by the parties, the appellate court affirmed this Court's denial of the motion for judgment of acquittal.

The movant's final contention, that his attorney gave an improper closing argument after failing to object to the Court's jury instructions, also lacks merit. The movant's claim that the jury instructions did not properly set forth the essential elements of the offense is a restatement of the movant's argument

pertaining to the sufficiency of the indictment. The court properly instructed the jury that they could not find the movant guilty unless they found that he acted with specific knowledge of the export laws and with specific design to evade its provisions. The Court explained that the jury was required to find that the movant "willfully violated the law" and properly defined the terms "knowingly" and "willfully." (Transcript of Trial, pp. 424-428). Counsel for the movant committed no error by failing to object to these instructions or in making a closing argument based upon the statement of the law embodied in those instructions.

As the movant has shown no prejudicial error on the part of his attorney, his claim of ineffective assistance of counsel must fail.

III. CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motion to Vacate, Set Aside, or Correct Sentence be DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable

James W. Kehoe, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 3rd day of February, 1993.

s/Lurana S. Snow
LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:
Mr. Roque A. Muracciole
[address omitted]

Marco D. Jimenez, Assistant
United States Attorney
[address omitted]

APPENDIX D

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 90-5438
Non-Argument Calendar

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D. C. Docket No. 89-809-Cr-JWK

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**versus**

**ROQUE A. MURACCIOLE,**

**Defendant-Appellant.**

---

Appeal from
the United States District Court
for the Southern District of Florida

---

(September 16, 1991)

Before TJOFLAT, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

Appellant Roque Muracciole ("Muracciole") was tried in the United States District Court for the Southern District of Florida (the "District Court") and convicted of violating the Export Administration Act (the "Act"). On appeal, Muracciole contended that there was insufficient evidence to establish that he possessed a computer with the knowl-

edge that it would be exported to a controlled country without a valid export license or that he prepared false sales invoice for the computer with the intent of evading the licensing provisions of the Act. We AFFIRM the judgment of the District Court.

## I. BACKGROUND

In a videotaped meeting with Muracciole in Miami, Florida on September 14, 1989, Eddy Haak ("Haak"), a confidential informant posing as a computer broker from France, expressed his interest in the purchase of computer equipment for export. During the meeting, Muracciole advised Haak that the export of the computer would require an individual validated export license from the Department of Commerce. Haak stressed, however, that he would not be able to obtain an export license because he did not wish to disclose the ultimate customer for the computer. Muracciole then agreed to Haak's request for a "double" invoice for the computer, one reflecting a lower sales price to avoid import taxes in France, where the computer would initially arrive. When Muracciole asked whether the computer would remain in France, Haak replied that the computer would leave France without a trace. Muracciole then suggested that if the computer were shipped by container it was less likely that it would be searched by the United States Customs Service and

that the computer's packaging could be altered to conceal the computer during shipping.

On September 23, 1989, another videotaped meeting occurred between Haak and Muracciole. After Haak repeated to Muracciole that he would not disclose the name of his customer, and that France was not the computer's ultimate destination, Muracciole stated that he would direct the export of the computer. Muracciole warned Haak that telephone calls and facsimiles might be tapped in the United States.

By facsimile dated September 23, 1989, Muracciole reiterated to Haak the need for an export license. In response, Haak telephoned Muracciole, reminding him that it would not be possible to obtain a license. During a taped telephone conversation between Haak and Muracciole on September 25, 1989, Haak repeated his dislike of the mention of the export license in the September 23 facsimile. Muracciole responded that he included the reference to the export license to ensure that they "have no problems." R2-125.

In a recorded telephone conversation on October 5, 1989, Haak informed Muracciole that the customer for the computer was in Bulgaria. In another recorded conversation on October 6, 1989, Haak stated that the customer was in Sofia. Sofia is the capital of Bulgaria.

On October 20, 1989, Muracciole and Haak met at Muracciole's place of busi-

ness in Miami Florida. Muracciole had requested that Haak travel to Miami because he did not want to discuss the export of the computer over the telephone. During the meeting, Muracciole explained that he would not export the computer through his own company. Instead, Muracciole suggested another freight forwarder. Muracciole added that as far as he was concerned, the computer would be sent to France. In response, Haak stated that he had his own transport from France to Bulgaria. Muracciole also revealed that he intended to list the computer on the sales invoice as "uninterruptible power supplies."

When Muracciole and Haak met again on November 3, 1989, Haak gave Muracciole a $61,000 check as a deposit on the $658,040 total cost of the computer. Muracciole transferred $15,00 to his computer supplier as a deposit, and told Haak that the shipping arrangements would be accomplished as soon as the supplier received the transfer.

At the November 3, 1989 meeting, Muracciole and Haak discussed the actual shipment of the computer. Muracciole informed Haak that the freight forwarder could be trusted to ensure that the shipment containing the computer would not be inspected by a United States Customs agent. The freight forwarder would complete the shipper's export declaration using the information

contained in the sales invoice. Muracciole also planned to place a large air conditioning blower inside the container holding the computer to help conceal the computer if the container were inspected.

Muracciole and Haak met again in Miami on November 9, 1989. Muracciole informed Haak that a domestic sales agreement had been drafted by an attorney, describing the sale of the computer as a local sale rather than for export. The domestic sales agreement was to help protect Muracciole from government investigation.

On November 10, 1989, Muracciole took Haak to inspect the computer which had been stored in a warehouse in Boca Raton, Florida. On the way to the warehouse, Muracciole questioned Haak as to the time required to transport the computer to Bulgaria. Muracciole also explained to Haak that the sales invoice for the computer would list the computer as uninterruptible power supplies and would designate "Baylock Power Supply" as the seller. At the warehouse, Muracciole then instructed Haak not to speak with the computer supplier representative. Haak inspected the computer, Muracciole and Haak left the warehouse and drove to a copy center in Miami. Muracciole purchased blank invoices in the name of Baylock Power that he had ordered earlier, signing the name "Carlos Rodriguez" on the order form. Muracciole

completed the sales invoice, describing the items sold, not as computer equipment, but as uninterruptible power supplies, complete battery cabinets, a spare parts kit, and a refrigerator blower. After the invoice was completed, Muracciole and Haak agreed to keep their secret copies of the invoice and the domestic sales agreement. Muracciole was arrested by United States Customs Agents later that day.

A federal grand jury returned a two count indictment against Muracciole. He was charged with: (1) possession of a computer system subject to the licensing provisions of the Act wit the intent to evade those provisions by exporting the computer from the United States knowing that Bulgaria was its ultimate destination; and (2) knowingly taking action to evade the licensing provisions of the Act. After a jury trial, Muracciole was convicted on both counts.

## II. DISCUSSION

On appeal, Muracciole contends that there was insufficient evidence to convict him on either counts of the indictment. When reviewing sufficiency of the evidence claims, "we are guided by the rule that all evidence, direct and circumstantial, must be viewed in the light most favorable to the government, accepting all reasonable inferences and credibility choices that end to support the jury's verdict." United States v.

Eley, 723 F.2d 1522, 1525 (11th Cir. 1984). "The evidence may be sufficient though it does not 'exclude every reasonable hypothesis of innocence or [is not] wholly inconsistent with every conclusion except that of guilt[,]'" provided that "'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Montes-Cardenas, 746 F.2d 771, 778 (11th Cir. 1984) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (Unit B en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)). As the trier of the fact, the "'jury is free to choose among reasonable constructions of the evidence.'" United States v. Blasco, 702 F.2d 1315, 1331 (11th Cir. 1983) (quoting Bell, 678 F.2d at 549).

A. Possession of the Computer

Muracciole contends that he did not have possession of the computer, and therefore, the evidence was sufficient to support his possession conviction. However, possession may be either actual or constructive. If the accused exercised "some measure of dominion and control over the contraband," either exclusively or with others, the contraband was in his constructive possession. United States v. Pruitt, 763 F.2d 1256, 1264 (11th Cir. 1985), cert. denied, 474 U.S. 1084, 106 S.Ct. 856, 88 L.Ed.2d 986 [sic; actually 896] (1986). The ability

to reduce an object to actual possession constitutes constructive possession. United States v. Martinez, 588 F.2d 495, 498 (5th Cir. 1979). Thus, a person who knowingly has the power and the intention to exercise dominion or control over an object, either directly, or through others, is in constructive possession of the object. Id. at 498 n.3.

The computer was in the warehouse in Boca Raton at the time of his arrest. Thus Muracciole clearly did not have actual possession of the computer. However, the evidence was sufficient to establish that Muracciole was in constructive possession of the computer, i.e., that he exercised some measure of control over the computer. First, Muracciole's computer suppler ordered the computer specifically for Muracciole and only at Muracciole's request. Second, Muracciole made a $35,000 deposit on the computer to have it moved, crated, freighted, and held for purchase. Third Muracciole was allowed to inspect the computer upon request. Fourth, Muracciole intended to take actual possession of the computer by paying the balance due the day after the inspection. These facts, considered together, establish that Muracciole was in constructive possession of the computer. Accordingly, the evidence was sufficient to convict him on his count.

B. Evasion of the Licensing Provisions of the Act

Muracciole also contends that the government failed to establish that he took action with the specific intent of evading the licensing provisions of the Act. However, the evidence clearly establishes that Muracciole falsified the sales invoice for the computer with the specific intent of evading the export license requirement of the Act. Muracciole knew that the computer's ultimate destination was Bulgaria and that an export license was required to ship the computer to that destination. To evade the licensing requirement, Muracciole suggested listing the computer on the sales invoice as "uninterruptible power supplies" and packing a large air conditioning blower fan in front of the computer to help disguise the computer in the event the container was searched. Muracciole intended to ship the computer in a neutral package without any markings identifying its contents. Muracciole also ordered blank sales invoices under a false company name and completed a false invoice for the computer, describing it as, inter alia, uninterruptible power supplies. Accordingly, the evidence was sufficient to convict Muracciole on this count.

AFFIRMED.

**APPENDIX E**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 18 1996

MIGUEL J. CORTEZ
CLERK

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 95-4001

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ROQUE MURACCIOLE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

On Appeal from
the United States District Court
for the Southern District of Florida

---

BEFORE: TJOFLAT, Chief Judge, EDMONDSON and BARKETT, Circuit Judges..

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Roque Muracciole, is Denied.

ENTERED FOR THE COURT:

s/Gerald B. Tjoflat
CHIEF JUDGE

ORD-41